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RDS Bina Sdn Bhd v Ong Chin Hoe & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCC-1509–09 OF 2011
MARY LIM J
7 MAY 2013

Civil Procedure — Pleadings — Material facts — Lifting of corporate veil not specifically pleaded — Statement of claim containing sufficient statements of facts referring to lifting of corporate veil — Whether essence of plea captured — Whether prejudice caused to defendant

Companies and Corporations — Directors — Duties — Obligations of passive director — Lifting of corporate veil — Whether passive director liable for debts of company

Companies and Corporations — Lifting of corporate veil — Piercing of corporate veil — Directors of company continuing to act using name of dissolved company — Directors acting as they pleased under cloak of separate corporate accountability — Special circumstances present to displace doctrine of separate legal responsibility — Whether directors liable for debt of company

Springs Court Sdn Bhd ('Springs Court') was the main contractor for a mixed residential project. The plaintiff was its main subcontractor. The project was completed but the plaintiff was not fully paid. On 9 June 2008, a settlement agreement was signed by the plaintiff and Springs Court whereby Springs Court agreed to pay the balance contract sum which was to be partially set-off through two units of bungalows. Other than a transfer of the bungalows to the plaintiff, the balance amount due was not settled. The plaintiff then filed this claiming for the balance due under the settlement agreement. The action was filed not against Springs Court but against the two defendants who were husband and wife because a search with SSM on 19 August 2011 revealed that Springs Court had been 'dissolved' on the application of the first defendant. The first defendant had statutorily declared on 31 December 2009, that (a) he was unsuccessful in locating the other shareholders; (b) Springs Court had not carried out any business/operations since 2008; and (c) Springs Court was not involved in any litigation whether in or outside Malaysia. The plaintiff claimed that the first defendant's statutory declaration was misleading, dishonest and false because: (i) Springs Court was in fact a company of two directors and shareholders, namely the first defendant and his son; the latter holding majority interest; (ii) following the settlement agreement, the plaintiff had met

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with the defendants on 10 April 2009 in relation to its audited accounts which indicated that Springs Court was very much in operation or carrying out business; and (iii) the settlement agreement was signed to suspend all legal actions taken against Springs Court. The plaintiff claimed that as a result of not providing true information to SSM, Springs Court was dissolved without it having settled its debts including those owed to the plaintiff. The plaintiff claimed that the defendants had every intention of dissolving Springs Court thereby absolving Springs Court, its directors and its shareholders from liabilities to the third parties. The defendants contended that there was no specific plea in the statement of claim for the lifting of the corporate veil in order to conclude that the defendants assumed liability of Springs Court and hence there was no sustainable claim in law against the defendants. The second defendant sought to distance herself in this claim, claiming to be a mere sleeping partner.

Held, allowing the claim:

(1) While the plaintiff acknowledged that Springs Court was a separate legal entity, the matters and events identified proved decisively that at all times, there was no separation between the defendants and Springs Court (see para 19).

(2) The plaintiff had pleaded sufficiently and there was no prejudice alleged or otherwise occasioned to the defendant. No specific language is required. Although the words 'lifting of the veil of incorporation' may not have been specifically used, there were more than adequate pleas in the statement of claim to satisfy the dictates of the Rules of Court 2012; and capture the essence of the plea (see para 39).

(3) The matters stated in the statutory declaration were not quite correct or more importantly, true. Springs Court was certainly very much in business and was carrying on business (see paras 39 & 60).

(4) There were present special circumstances here to displace the doctrine of separate legal responsibility. The defendants' actions including attending court after Springs Court had been deregistered, without indicating in any manner whatsoever about the deregistration exercise that they had set in motion, were actions inconsistent with that of the defendants as mere directors or shareholders of Springs Court. On the contrary, their actions were consistent and akin with the conclusion that there was in fact no separation between them and Springs Court whether as directors or shareholders. The defendants displayed conduct indicating that they were not in the least concerned with the status of Springs Court. The letter heads of Springs Court continued to be used for correspondence. The manner in which the defendants handled the affairs of Springs Court illustrate their relationship with Springs Court; it was theirs to do as they pleased; under the cloak of separate corporate accountability. The

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defendants were unconcerned, unperturbed with Springs Court no longer being an ongoing business, or that it had been struck off the register of companies by SSM. It was business as usual (see paras 82–85).

(5) There were special circumstances present to find the defendants liable for the debt due to the plaintiff. The defendants were the directing mind behind Springs Court and they could not use the veil to hide their true role and responsibilities (see para 86).

(6) The second defendant as the majority shareholder was quite content to let the first defendant, her husband run the show. Nevertheless, she echoed his decisions. The second defendant could not disclaim liability by folding back her arms and playing a passive role. She, too, must be held accountable. There was no distinction between her and the first defendant (see para 90–91).

[Bahasa Malaysia summary

Spring Courts Sdn Bhd ('Spring Courts') adalah kontraktor utama bagi projek gabungan perumahan. Plaintif adalah subkontraktor utamanya. Projek tersebut telah disempurnakan tetapi plaintif tidak dibayar sepenuhnya. Pada 9 Jun 2008, satu perjanjian penyelesaian telah ditandatangani oleh plaintif dan Spring Court di mana Springs Court bersetuju untuk membayar baki jumlah kontrak yang sepatutnya ditolak sebahagiannya melalui dua unit banglo. Selain daripada pindah milik banglo-banglo tersebut kepada plaintif, baki jumlah terhutang belum lagi diselesaikan. Plaintif kemudiannya memfailkan ini, menuntut bagi baki di bawah perjanjian penyelesaian. Tindakan ini difailkan bukan terhadap Springs Court tetapi terhadap kedua-dua defendan yang merupakan pasangan suami isteri kerana carian di SSM pada 19 Ogos 2011 menunjukkan bahawa Springs Court telah 'dibubarkan' berdasarkan permohonan defendan pertama. Defendan pertama telah, secara statutori, mengisytiharkan pada 31 Disember 2009 bahawa (a) dia tidak berjaya mencari pemegang-pemegang syer yang lain; (b) Spring Court tidak menjalankan sebarang perniagaan/operasi sejak 2008; dan (c) Springs Court tidak terlibat di dalam litigasi sama ada di dalam atau di luar Malaysia. Plaintif menghujahkan bahawa deklarasi statutori defendan pertama adalah mengelirukan, tidak jujur dan tidak benar kerana (i) Springs Court sebenarnya satu syarikat dengan dua pengarah dan pemegang-pemegang syer, khasnya defendan pertama dan anak lelakinya kedua-duanya memegang kepentingan majoriti (ii) berikutan perjanjian penyelesaian, plaintif telah berjumpa dengan defendan-defendan pada 10 April 2009 berkenaan akaun yang telah diauditkan yang menunjukkan bahawa Springs Court sedang beroperasi dan menjalankan perniagaan; dan (iii) perjanjian penyelesaian ditandatangani untuk menahan semua tindakan undang-undang yang diambil terhadap Springs Court. Plaintif menghujahkan bahawa akibat tidak memperuntukkan maklumat yang betul kepada SSM, Springs Court dibubarkan tanpa ia menyelesaikan hutang-hutangnya termasuk kesemua yang dihutang terhadap plaintif. Plaintif

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menghujahkan bahawa defendan-defendan mempunyai niat untuk membubarkan Springs Court dan dengan itu, membebaskan Springs Court, pengarah-pengarah dan pemegang-pemegang syernya daripada liabiliti kepada pihak ketiga. Defendan-defendan menghujahkan bahawa tiada pli yang spesifik dalam pernyataan tuntutannya bagi menyingkap tabir korporat untuk memutuskan bahawa defendan-defendan bertanggungan terhadap Springs Court dan oleh itu tiada tuntutan yang boleh dikekalkan di bawah undang-undang terhadap defendan-defendan. Defendan kedua memohon untuk menarik diri dalam permohonan ini, mendakwa dirinya sekadar rakan kongsi tidur.

Diputuskan, membenarkan tuntutan:

(1) Walaupun plaintif memperakui bahawa Springs Court adalah entiti undang-undang yang berasingan, hal-hal perkara dan kejadian-kejadian yang dikenal pasti membuktikan secara konklusif bahawa pada setiap masa, tiada pemisahan antara defendan dan Springs Court (lihat perenggan 19).

(2) Plaintif telah memplidkan secukupnya dan tiada prejudis yang didakwa atau sebaliknya yang berlaku kepada defendan. Tiada bahasa spesifik yang diperlukan. Walaupun perkataan 'menyingkap tabir pemerbadanan' tidak digunakan secara spesifik, terdapat lebih daripada cukup pli di dalam pernyataan tuntutan untuk memenuhi kehendak Kaedah-Kaedah Mahkamah 2012; dan menepati inti pati pli (lihat perenggan 39).

(3) Hal-hal perkara yang dinyatakan di dalam deklarasi statutori tidak berapa tepat atau lebih penting lagi, benar. Springs Court masih berniaga dan menjalankan perniagaan (lihat perenggan 39 & 60).

(4) Terdapat beberapa hal-hal keadaan khas di sini untuk menggantikan doktrin tanggungjawab undang-undang. Tindakan defendan-defendan termasuk menghadiri mahkamah selepas Springs Court dikeluarkan daripada pendaftaran, tanpa menyatakan dalam apa jua cara mengenai pengeluaran daripada pendaftaran yang telah mereka rancangkan, adalah tindakan-tindakan yang tidak selari dengan defendan-defendan sebagai pengarah-pengarah atau pemegang-pemegang syer Springs Court. Sebaliknya, tindakan mereka adalah selari dan lebih mirip kepada keputusan bahawa sebenarnya, tidak terdapat pemisahan antara mereka dan Springs Court sama ada pengarah-pengarah atau pemegang-pemegang syer. Defendan-defendan menunjukkan tindakan yang mengatakan bahawa mereka tidak peduli dengan status Springs Court. Kepala-kepala surat Springs Court digunakan secara berterusan. Cara di mana defendan-defendan menangani hal-hal Springs Court menunjukkan hubungan mereka dengan Springs Court; ia boleh berbuat sesuka hati di bawah tirai pemisahan tanggungjawab korporat.

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Defendan-defendan tidak peduli dan tidak terganggu dengan Springs Court yang tidak lagi berniaga atau bahawa ia telah dibatalkan daripada daftar syarikat oleh SSM. Ia adalah perniagaan seperti biasa (lihat perenggan 82–85).

(5) Terdapat keadaan khas yang ada untuk memutuskan defendan bertanggungan terhadap hutang tertunggak kepada plaintiff. Defendan-defendan adalah tulang belakang kepada Spring Court dan mereka tidak boleh menggunakan tabir untuk menyembunyikan peranan dan tanggungjawab mereka yang sebenar (lihat perenggan 86).

(6) Defendan kedua, sebagai pemegang saham majoriti agak berpuas hati untuk membenarkan defendan pertama, suaminya mengendalikan syarikat. Namun dia mengikut keputusan-keputusan defendan pertama. Defendan kedua tidak boleh menafikan tanggungjawabnya dengan tidak mengambil tahu dan memainkan peranan pasif. Dia juga, mesti diputuskan bertanggungan. Tiada perbezaan antara dia dan defendan pertama (lihat perenggan 90–91).]

Notes

For cases on duties, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 241–265.

For cases on material facts, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 6796–6811.

Cases referred to

Alcatel-Lucent (M) Sdn Bhd (formerly known as Alcatel Network Systems (M) Sdn Bhd v Solid Investments Ltd and another appeal [2012] 4 MLJ 72, CA (not folld)

Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor [1988] 1 MLJ 97, SC (refd)

Chiew Sze Sun & Anor v Cast Iron Products Sdn Bhd & Ors [1993] MLJU 115; [1994] 1 CLJ 157, HC (distd)

Chong Nyuk Fung & Anor v Loi Lung Kiong & Ors [1998] MLJU 41; [1998] 5 CLJ 146, HC (refd)

DHN Food Distributors Ltd v Tower Hamlets London Borough Council [1976] 1 WLR 852, CA (refd)

Formcrete Services Pty Ltd, Re (1976) 5 ACLR 46, SC (distd)

Jones and Another v Lipman and Another [1962] 1 All ER 442, Ch D (refd)

Law Kam Loy and Anor v Boltex Sdn Bhd and Others [2005] MLJU 225; [2005] 3 CLJ 355, CA (refd)

Ong Thean Chye & Ors v Tiew Choy Chai & Anor [2011] 4 MLJ 616, CA (not folld)

Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor [1996] 3 MLJ 533; [1997] 1 CLJ 529, FC (refd)

Vellasamy a/l Ponnusamy v Gurbachan Singh a/l Bagawan Singh & Ors [2006] 2

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A MLJ 715; [2006] 1 CLJ 805, HC (not folld)
Waldcourt Investment Co Pty Ltd, Re (1986) 11 ACLR 7 (distd)
Woolfson v Strathclyde Regional Council 1978 SLT 159, HL (refd)

Legislation referred to

B Companies Act 1965 ss 181, 308, 308(2), (5)
Rules of Court 2012 O 12 r 11, O 18 r 12
Rules of the High Court 1980

KC Tang (Mohammad Shafee with him) (KC Tang & Co) for the plaintiff.
C *Mohan Krishnan (V Varunnath and Jagdesh Singh with him) (Jayasuria & Assoc) for the defendants.*

Mary Lim J:

D **[1]** The plaintiff's claim against the defendants are for loss and damage sustained as a result of their actions, decisions and conduct in relation to a company known as Springs Court Sdn Bhd. These are the details.

E THE PLAINTIFF'S CLAIM

[2] Springs Court Sdn Bhd ('Springs Court') was the main contractor for a mixed residential project known as Taman Hulu Langat Jaya, Ulu Langat. The plaintiff was its main subcontractor appointed on 18 July 2000. Around 2001, F the project was abandoned. On 7 April 2006, the plaintiff entered into an agreement with Springs Court, OCH Properties Management Sdn Bhd ('OCH') and QT Environment (M) Sdn Bhd ('QT') to complete works relating to the building of 123 units of bungalows in that project. In that said agreement, the following was admitted:

G (a) that OCH had received RM11,996,112.45 from the house buyers leaving a sum of RM2,116,961.55 outstanding;

(b) that Springs Court had received RM15,394,869.24 from the house buyers leaving a sum of RM1,418,865.76 outstanding;

H (c) that the plaintiff would be paid the contract sum of RM8,969,554 which includes a retention sum of RM500,000 but excludes a sum of RM357,000; and

(d) that OCH and Springs Court will be jointly and severally liable to the I pay the plaintiff for the contract sum.

[3] The said project was completed on 31 March 2007 but the plaintiff claimed that it had not been fully paid. So, the parties met to negotiate settlement. They met twice, on 24 and 25 September 2007.

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[4] On 9 June 2008, a settlement agreement was finally signed by both the plaintiff and Springs Court and one other party known as Ideal Dream Sdn Bhd. In this settlement agreement, Springs Court is said to have agreed to pay the balance contract sum of RM2,119,860.76, that the amount due be partially set-off through two units of bungalows of the value of RM1.2m leaving a sum of RM919,860.76.

[5] Other than a transfer of the two units to the plaintiff in 2008, the amount due was never settled. The plaintiff then demanded from Springs Court the balance due under the settlement agreement, a sum of RM357,000 which it claimed was already due when the project was first abandoned; and two further sums: RM28,020 for variation works and RM282,292.20 for an access road; a total sum of RM1,587,172.96. There was no payment. The plaintiff then filed its claim on 19 September 2011.

[6] It is filed not against Springs Court but against the two defendants who are husband and wife. The plaintiff did not file against the Springs Court because its search with SSM on 19 August 2011 revealed that it had been 'dissolved'. It learnt that Springs Court had been dissolved on the application of the first defendant who had statutorily declared on 31 December 2009, that Springs Court was no longer in operation or was no longer an ongoing concern (*tidak beroperasi atau tidak menjalankan perniagaan*). On the first defendant's application made on behalf of Springs Court, SSM issued a notice to strike off the name of Springs Court from the register under s 308(2) of the Companies Act 1965. That notice was duly *gazetted* on 23 August 2010.

[7] In making its present claim against the defendants, the plaintiff examined the details related to and leading to the dissolution; and identified certain key factors and events including court proceedings in which Springs Court and the defendants were involved. These key factors and events comprised the statutory declaration lodged with SSM, court proceedings brought by one of the purchasers in the project, and certain operational details of as well as relationship between the several companies in which the defendants were involved in.

[8] In that statutory declaration, the first defendant is said to have held out:

(a) he was a director and shareholder of Springs Court and that he was unsuccessful in locating the other shareholders;

(b) Springs Court had not carried out any business/operations since 2008; and

(c) Springs Court was not involved in any litigation whether in or outside Malaysia.

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[9] In relation to this statutory declaration, the plaintiff claimed that the first defendant's statutory declaration to SSM was misleading, dishonest and false in relation to Springs Court and that it was given mala fide. The plaintiff went through each of these declarations to make its case. In respect of the first declaration, the plaintiff claimed that the records showed that Springs Court was in fact a company of two directors and shareholders, namely the first defendant and his son; the latter holding majority interest. According to the plaintiff, the first statement in the SD was therefore untrue.

[10] As for the second statement, it is alleged to be also untrue by virtue of the events which the plaintiff set out chronologically at para 35 of the statement of claim. The plaintiff stated that following the settlement agreement, the plaintiff had met with the defendants on 10 April 2009 in relation to its audited accounts for the years running from 30 September 1999 – 30 September 2007. At that meeting, the plaintiff claimed that it had also handed to the defendant a statement of accounts as at 21 August 2009 wherein a sum of RM861,189.81 was claimed.

[11] The plaintiff then went through Springs Court's accounts. It identified various sums which Springs Court received from the house buyers which are not only contrary to the sum mentioned in the settlement agreement, but indicated that Springs Court was very much in operation or carrying out business despite what was stated in the statutory declaration.

[12] As for the statement that it was not involved in any litigation, the plaintiff alleged that this, too, was untrue. It claimed that the settlement agreement was signed to suspend all legal actions taken against Springs Court. According to SSM's letter dated 23 January 2009 to Pong Ah Lip, the plaintiff claimed that it was also clear that Springs Court and one of its directors had been charged in the Sessions Court, Kuala Lumpur in 2009.

[13] On the matter of other court proceedings, the plaintiff claimed that through the second defendant, Springs Court had also recorded consent judgment in the Sessions Court at Kuala Lumpur (No 9–52–12475 of 2004). However, Springs Court failed to pay and judgment debtor proceedings were then initiated. In those proceedings, the defendants were examined twice, on 11 and 15 March 2010.

[14] At no time did the defendants inform the court that Springs Court had been dissolved or that the first defendant had applied for the dissolution of Springs Court. On 18 March 2010, the sessions court ordered Springs Court to pay the sum stipulated in the JDS. That order was not complied with leading to the issue of a notice of committal being issued against the defendants as directors of Springs Court.

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[15] On 12 January 2011, the defendants, as directors of Springs Court settled the debt on terms. Again, at no time did the defendants inform the court that Springs Court had been dissolved. Despite the dissolution of Springs Court, the defendants filed an appeal on 24 January 2011 in Springs Court's name. That appeal which was heard on 8 March 2011 was dismissed. Once again, the plaintiff claimed that the defendants never informed the court of the dissolution of Springs Court.

[16] Moving next to the matter of the various companies under the defendants, the plaintiff claimed that these defendants were directors and shareholders of Springs Court, OCH and Ong Chin Hoe & Sons. The plaintiff further, inter alia, claimed that the defendants failed to provide the true facts concerning the majority shareholder in Springs Court, Ong Chee Meng who is their son; and explain why his name did not appear in the SSM search for 19 August 2011.

[17] The plaintiff claimed that as a result of these various acts in relation to the accounts, of not providing true information to SSM, Springs Court was dissolved without it having settled its debts including those owed to the plaintiff. According to the plaintiff, the defendants are jointly and severally liable for the liabilities of Springs Court because they had deliberately and with bad faith, failed to inform the relevant courts and SSM of the true or real position of Springs Court. The plaintiff claimed that the defendants had every intention of dissolving Springs Court thereby absolving Springs Court, its directors and its shareholders from liabilities, including liabilities to the third parties such as the plaintiff.

[18] The plaintiff claimed to have suffered loss by reason of the defendants' actions, decisions and conduct. It then sought, inter alia, declaratory orders to the effect that the defendants as directors of Springs Court be personally, jointly and severally liable for the sum of RM1,587,172.96.

FINDINGS OF THE COURT

[19] After examining the facts and the law applicable and after considering the submissions of both counsel, the court agreed that the plaintiff has indeed proved its case against these defendants on a balance of probabilities. As pointed out earlier, the plaintiff's claim is against the defendants personally for the sums due and owing by Springs Court. While the plaintiff acknowledged that Springs Court is a separate legal entity, the matters and events identified prove decisively that at all times, there is no separation between the defendants and Springs Court.

[20] Dealing first with the facts, not much is really in dispute.

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[21] It started with OCH who purchased a piece of land from Ideal Dream Sdn Bhd. Springs Court was supposed to build 123 units of bungalows on that land. On 18 June 2000, Springs Court awarded the plaintiff the contract to build 100 units of those bungalows for RM12.8m. Sometime around 2001, the issue of access to the project site presented problems leading to a suspension of the project.

[22] Around 2006 and after the issue of the access road had been resolved, the parties got together again to complete the said project. This time, together with another company known as QT Environment and the plaintiff, the parties (namely Springs Court, OCH, the plaintiff and QT) entered into an agreement dated 7 April 2006 for that purpose. By another agreement dated 19 May 2006, the plaintiff was awarded a contract to carry out remedial works and to complete the balance of 23 units of bungalows.

[23] According to the defendants, around 2007 when the said project was almost completed, the plaintiff informed Springs Court that a sum of RM2,119,860.76 was still due and outstanding. The defendants claimed that at that time, the parties had a cordial relationship. So, they met to negotiate on these claims.

[24] Following two meetings between the parties on 24–25 September 2007, the parties supposedly agreed that the sum of RM2,119,860.76 would be an 'interim tentative figure'; that sum was subject to verification and the final bills and confirmation by the project consultants and Springs Court. It was also agreed that the sum be settled by way of a set-off through two units of bungalows. A settlement agreement to that effect was then signed between the parties on 9 June 2008.

[25] In 2008, the two units of bungalows were transferred to the plaintiff. In March 2010, the plaintiff presented Springs Court with its audited accounts showing the sum still owing to the plaintiff. After perusing those accounts, the defendants said that the plaintiff's figures were inaccurate as it included a sum of RM357,000 which arose under the first agreement and which sum should not be taken into account. Further negotiations took place resulting in what the defendants allege was an agreement by the plaintiff to accept a sum of RM350,000 as full and final settlement of whatever was outstanding under the said project. This sum was to be paid within six months from March 2011, that is, by September 2011. The claim was filed on 19 September 2011.

[26] From these facts, it can be safely said that the despite the initial start stop state of the project, the plaintiff was nevertheless engaged by Springs Court to complete when the project when it was revived or resumed. It can also be safely said that despite successfully completing the project, the plaintiff was not fully

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paid. Despite the parties meeting several times to negotiate settlement, the plaintiff remained unpaid leading to the present suit being filed.

[27] Learned counsel for the defendants summarised the plaintiff's basis for its claim as follow:

(a) that the defendants were directors of Springs Court;

(b) that the first defendant had wrongfully prepared and submitted an untrue declaration to SSM towards ensuring that Springs Court was struck off the register of companies; and

(c) that therefore the plaintiff was entitled to bring an action against the defendants to recover monies that Springs Court purportedly owed the plaintiff.

[28] The defendants submitted that the plaintiff's claim has no merit for the following reasons:

(a) the plaintiff has failed to plead that it was lifting the corporate veil;

(b) any debt owed to the plaintiff was owed solely and exclusively to the plaintiff by Springs Court based on the principle of corporate responsibility;

(c) at no point in time did either the defendant assume personal responsibility for any of Springs Court's debt;

(d) the impugned statutory declaration did not contain inaccurate information; and

(e) the proper recourse for the plaintiff was to petition the court under s 308(5) of the Companies Act 1965 for a reinstatement of Springs Court, wind up Springs Court and then utilise the proceeds from the winding up towards satisfaction of any debt owed to the plaintiff.

[29] The above issues can actually be summarised as follow:

(a) is there a plea to lift the corporate veil?

(b) if yes, should the court lift the corporate veil?

(c) are the defendants liable?

(d) what is the plaintiff's loss?.

Issue (a) Is there a plea to lift the corporate veil

[30] According to the defendants, there is no specific plea in the statement of claim for the lifting of the corporate veil in order to conclude that the

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defendants assumed liability of Springs Court; or that the defendants are the alter ego of Springs Court, that Springs Court is a mere sham or facade to enable the defendants to perpetrate fraud or deception on the world. There is therefore no sustainable claim in law against these defendants in which case the claim must be dismissed in limine.

[31] The defendant had relied on several decisions on this issue. Having carefully examined those decisions, I must with respect, disagree with the defendants.

[32] First, the decision of the Court of Appeal in *Ong Thean Chye & Ors v Tiew Choy Chai & Anor* [2011] 4 MLJ 616. This is what the Court of Appeal said at p 649:

> [76] The respondent's statement of claim did not allude to the need to lift the veil of incorporation of the third appellant and we are reluctant to do so. The parties are bound by their pleadings.
>
> [79] It is our judgment that the only justification for lifting the veil of incorporation would be where the company is not a separate entity. But in the instant appeal, this point was not pleaded by the respondent in their statement of claim ...

[33] In that case, the appellants had entered into a sale and purchase agreement with several vendors to purchase several parcels of land. A separate document was drawn up where the respondents were paid 'professional fees and charges for negotiating and securing on behalf of the third appellant, the said lands at the agreed price of RM3,883,645'. There was partial payment. The respondent's claim was for the balance due. The appellants, inter alia, pleaded that the respondents had no cause of action against the first and second appellants; that the document was invalid as the respondents were unlicensed real estate agents, that the document was a sham; and that the respondents had no locus standi. The Court of Appeal's observations at p 616 on this matter of plea appears to have made in passing.

[34] Similarly, the Court of Appeal's decision in *Alcatel-Lucent (M) Sdn Bhd (formerly known as Alcatel Network Systems (M) Sdn Bhd v Solid Investments Ltd and another appeal* [2012] 4 MLJ 72. At paras 10–11 of its judgment, the Court of Appeal opined that the learned judge had gone beyond the pleaded case when he lifted the corporate veil to find the appellant liable when it was not a party to the agreements which form the substratum of the respondent's claim. The Court of Appeal cited the decision of *Vellasamy a/l Ponnusamy v Gurbachan Singh a/l Bagawan Singh & Ors* [2006] 2 MLJ 75; [2006] 1 CLJ 805 for the principle that there must be a specific plea to lift the corporate veil.

[35] I have also read *Vellasamy*'s case and I note that the Court of Appeal there too had, in passing observed that the issue of lifting or piercing of the

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corporate veil was not even pleaded as part of the plaintiff's case — see para 14 at p 816. The court said that on this reason alone, the issue could be disregarded.

[36] However, it is to be noted that in none of these decisions has the Court of Appeal say what is meant by a specific plea; whether it meant that the phrase 'lifting of the corporate veil' or words to that effect must be made. All that the Court of Appeal said was that there must be a specific plea. So, how should the plea be?.

[37] In this regard, assistance may be rendered by the Rules of the High Court 1980 (when this claim was filed) or the present Rules of Court 2012 (there is no difference between the two sets of Rules on this). Quite apart from the fundamental principle that parties are bound by their pleadings, in the matter of the requisites of their pleas, there is O 18 r 12 of the Rules of Court 2012 which reads as follow:

> 12(1) Subject to paragraph (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including without prejudice to the generality of the foregoing words-
>
> (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies on;
>
> (b) where a party pleading alleges any condition of mind of any persons whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies on.

[38] Pursuant to this order, the plaintiff is required to particularise what is in essence, special pleas. Examples of such pleas are given but it may be said that the list is by no means exhaustive. There is also O 12 r 11 which states that a party may raise any point of law in their pleadings. The rationale behind such a requirement resides in the principle of fair play and a just trial. For that purpose, the other party is alerted by this particular allegation or plea, answers or addresses it in the best way that the party thinks fit and so that it may present evidence or plead with the court at trial. Nowhere in any of these rules is there any provision to the effect as to the precise language or terms to be used. What is important is that the special plea must be made and the other side is not embarrassed by the plea and is able to respond to the plea.

[39] Here, this rule is not offended at all as the plea has indeed been raised and in my view, more than adequately. The plaintiff has pleaded sufficiently and there is no prejudice alleged or otherwise occasioned to the defendant. I agree with learned counsel for the plaintiff that no specific language is required.

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Although the words 'lifting of the veil of incorporation' may not have been specifically used, there are more than adequate pleas in this statement of claim to satisfy the dictates of the Rules of Court 2012; and capture the essence of the plea. This can be gleaned from the following paragraphs: paras 8–11, 14–15, 20 and 23 onwards and more specifically paras 29–59. At these latter paragraphs, the plaintiff identified the particular matters in the statutory declaration that it claimed were incorrect and untruths that were inserted to mislead SSM into striking Springs Court from the register. The plaintiff gave its reasons as to why it made these allegations.

[40] These paragraphs contain the details, particulars, grounds and circumstances upon which the plaintiff seeks to move the court. These paragraphs in the statement of claim are detailed and comprehensive. They are adequate so much so that the defendants were unimpeded and were able to respond to them quite readily and comprehensively. These paragraphs in the defence will illustrate this: namely paras 6, 17 and 18; and from paras 19 onwards to 29 were specific responses to the allegations on the statutory declaration. Paragraph 6 is of particular interest and it reads:

> 6. Perenggan 11 sehingga 12 SOC tersebut adalah dinafikan dan Plaintif diletakkan di atas beban bukti kukuh. Defendan-Defendan menafikan bahawa mereka adalah minda yang mengawal OCH Properties, Springs Court dan satu syarikat yang dipanggil Ong Chin Hoe & Sons Sdn Bhd. Syarikat-syarikat ini adalah/masih adalah badan undang-undang berasingan ('separate legal entities') dan adalah personalti berbeza daripada Defendan-Defendan yang mana Plaintif telah memilih untuk membawa tindakan ini terhadap.

[41] I therefore do not find this argument of any merit.

Issue (b) If yes, should the court lift the corporate veil

Issue (c) Are the defendants liable

[42] Since the court has found that there is no lack of plea in the statement of claim, the next issue is whether the corporate veil of Springs Court ought to be lifted in the facts and circumstances of this case. In the event the court lifts the veil, the ensuing question is whether the defendants should be made personally liable.

[43] On the first of these two issues which shall be taken together, the Supreme Court had in *Chong Nyuk Fung & Anor v Loi Lung Kiong & Ors* [1998] MLJU 41; [1998] 5 CLJ 146 citing *Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97 said:

> The apex court of this country had given some guidelines on the exercise of discretion to lift a corporate veil. In *Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra*

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Malaysia Bhd & Anor ... the Supreme Court said:

> The court would generally lift the corporate veil in order to do justice particularly when an element of fraud is involved although the consequences of lifting the veil would vary according to the circumstances of each case.

[44] The defendants argued that although the circumstances when the court will lift or pierce the corporate veil is not cast in stone, that power has generally been exercised only where there are 'special circumstances'. This view was also expressed by the Court of Appeal in *Law Kam Loy and Anor v Boltex Sdn Bhd and Others* [2005] MLJU 225; [2005] 3 CLJ 355 after examining several high authorities before concluding that the previous 'liberal view' of by-passing the fundamental principle that a company is a separate corporate legal entity distinct from its shareholders 'when the justice of the case so demands', 'no longer prevails' and can 'no longer be sustained'.

[45] At p 362, the Court of Appeal there had further cited the House of Lords' decision in *Woolfson v Strathclyde Regional Council* 1978 SLT 159 where Lord Keith on behalf of the House expressed 'some doubts' of the liberal view expressed by Lord Denning in *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852:

> I have some doubts whether in this respect the Court of Appeal properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that is a mere facade concealing the true facts.

[46] The Court of Appeal opined that:

> In my judgment, in the light of the more recent authorities such as *Adams v Cape Industries Plc*, it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. *It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity*. The former, that is to say, actual fraud, was expressly recognised to be an exception to the doctrine of corporate personality by Lords Halsbury in his speech in *Salomon v A Salomon & Company Ltd* [1897] AC 22, the seminal case on the subject ... (Emphasis added.)

[47] It would therefore appear that there must be 'special circumstances' before the court should be looking to lift the veil of incorporation. What circumstances may be said to be 'special' is not closed but the Court of Appeal had given some indication that it would 'include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity'.

[48] The Court of Appeal added that a good illustration of 'equitable fraud'

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A can be found in the decision of *Jones and Another v Lipman and Another* [1962] 1 All ER 442. In this case, Russell J said:

> The defendant company is the creature of the defendant, a device and a sham, a mask which he holds before his face in an attempt it avoid recognition by the eye of equity ... an equitable remedy is rightly to be granted directly against the creature in such circumstances.

[49] The defendants maintained that there are no special circumstances present in this case to warrant the piercing of the corporate veil. At all times, the defendants acted on behalf of Springs Court and the liability should remain Springs Court's.

[50] The plaintiff has relied on certain conduct, actions and decisions of the defendants as amounting to special circumstances warranting the lifting of Springs Court's corporate veil and pinning the defendants with personal liability. These matters may be set out as follow:

(a) the deregistration of Springs Court;

(b) the court proceedings; and

(c) negotiations and meetings.

[51] It is the plaintiff's case that the defendants' conduct, actions and decisions in relation to these matters reveal that at all material time, the defendants were the directing minds behind Springs Court and that they should be made liable personally. It is the plaintiff's case that the defendants' action in deregistering Springs Court is telling of their intent. That they set about deregistering Springs Court so that the plaintiff could not sue Springs Court for the monies owed to the plaintiff; and when the plaintiff sued the defendants instead, the defendants then applied to set aside the deregistration (the plaintiff maintain that this conclusion is not detracted by the defendants' withdrawn of the application).

[52] As for the court proceedings and the negotiations and meetings, the complaint here is that the defendants never indicated at any time, of their application to deregister Springs Court; and the deregistration of Springs Court. It is the plaintiff's argument that this indicates that the status of Springs Court was actually immaterial or irrelevant as the defendants assumed liability personally at all time.

[53] Each of these matters needs to be examined. First, the defendants' application to deregister Springs Court.

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[54] According to the first defendant, he had set about the deregistration process after SSM had initiated action against OCH, Springs Court and the defendants for, inter alia, violation of their responsibilities in failing to file annual accounts for these companies from 1999–2007 and for which substantial fines of RM60,000 had been paid. It was in order to avoid further fines and liabilities that he and his wife, the second defendant decided to list the companies as 'dormant' or 'inactive'.

[55] This happenstance of SSM affording Springs Court and other companies that had not filed their annual reports and financial statements a moratorium whereby such companies were allowed to apply for deregistration without company resolutions and the usual documents was confirmed by DW2, Puan Hanita Hussain from SSM. However, it cannot, for any moment be said that this allows Springs Court or any company for that matter to set about filing statutory declarations containing untruths. And, this is where the plaintiff makes its allegations that the SD that the defendants filed is false in that it contains untruths or incorrect details drawing then inferences and conclusions that the plaintiff now relies on for its claim against the defendants personally. The contents of the SD must therefore be examined.

[56] The first defendant (who testified for himself as well as for the second defendant) did not dispute the contents of the SD that he had made. He claimed that it was a fair representation of Springs Court's position at that time and that it was made in good faith.

[57] From the evidence before me, I am convinced that the matters stated in the SD, that is, that the first defendant was 'unsuccessful in locating the other shareholders'; that 'Springs Court had not carried out any business/operations since 2008'; that 'Springs Court was not involved in any litigation whether in or outside Malaysia'; are not quite correct or more importantly, true. These three matters are critical matters.

[58] The first concerns locating the other directors and shareholders. Given that the other directors of Springs Court are the second defendant who is the first defendant's own wife, and Ong Chee Meng, the first defendant's son, to state that he cannot locate them, the first defendant had clearly and blatantly lied. His explanations to the court that he was 'rushing for submissions', that he was filling in 'a standard form' and the cavalier way he went providing details were unreasonable and unacceptable.

[59] As for the second matter, the defendants' explanation was that Springs Court was not an ongoing concern because it had not been undertaking any new projects. It was only settling outstanding debts. It was further submitted that the entry into the settlement agreement and the filing of its audited

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accounts could not amount to new businesses being transacted. The defendants alluded to Springs Court's memorandum of association and articles of association in support of their contentions.

[60] Again, with respect, I must disagree. From the evidence presented, Springs Court was certainly very much in business and was carrying on business. It may not have been 'building' anything in the strict sense but it was still actively carrying on business. Meetings, negotiations and letters written were all conducted in the name of Springs Court. I cannot see how such matters are not part and parcel of ordinary business operations which renders a company as an ongoing concern.

[61] As for the third declaration, the existence of any litigation. I note that DW2 has testified that if a company is not involved in any active litigation, then the condition is satisfied. The first defendant himself also testified that the last litigation that Springs Court was involved in was prior to the declaration. In that litigation, Springs Court had been sued by two company-purchasers who had bought a bungalow unit in the project. The action was settled by way of a consent order. The JDS proceedings in relation to that consent order was only initiated after the SD had been lodged accounting for the defendants' stand that Springs Court was not involved in any active litigation.

[62] With respect, I must disagree. The language there does not incorporate 'active litigation' at all but 'litigation'. It surely must mean litigation of any sort and at any level of progress as this requirement must be to address any concerns on liability or potential liability of the applying company to the third parties or creditors. Be that as it may, I accept that at the material time of the declaration, JDS proceedings had not been initiated. That being so, it is reasonable for the defendants to say that Springs Court was not involved in any litigation at that material time.

[63] While SSM may have afforded a moratorium, and there is nothing wrong with any company including a company such as Springs Court to take advantage of that moratorium; that cannot and does not mean in the least that any statutory declaration will do. At all times, all the contents must always be correct and true. It is not enough for just some to be truth.

[64] In my judgment, the defendants were well aware of all that was happening to Springs Court. From my observation of the witnesses, the first defendant is a person extremely familiar with the workings of corporations. On his own testimony, he has no less than 16 companies. A person in that position cannot plead ignorance or innocence like he has now attempted to in this trial. The declarations that he made must be taken to be deliberate and accurate

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holdings out; and he must be taken to be aware of the consequences of any inaccuracies, or worse, untruths in them.

[65] Related to this is the defendants' argument that where a company has been struck off the register of companies, the proper option for any aggrieved party such as the plaintiff, is to avail itself to s 308 of the Companies Act 1965. Section 308(5) provides:

> (5) If any person feels aggrieved by the name of the company having been struck off the register, the Court may on an application made by the person at any time within fifteen years after the name of the company has been so struck off may, if satisfied that the company was, at the time of the striking off, carrying on business or in operation or otherwise that it is just that the name of the company be restored to the register, order the name of the company be restored to the register, and upon an office copy of the order being lodged with the Registrar the company shall be deemed to have continued in existence as if its name had not been struck off, and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

[66] The defendants argued that the plaintiff is arguably an aggrieved person as it is a creditor. The defendants cited the decisions of *Re Formcrete Services Pty Ltd* (1976) 5 ACLR 46; *Re Waldcourt Investment Co Pty Ltd* (1986) 11 ACLR 7; and *Chiew Sze Sun & Anor v Cast Iron Products Sdn Bhd & Ors* [1993] MLJU 115; [1994] 1 CLJ 157 in support of its arguments.

[67] With respect, those decisions are readily distinguishable from the present facts and circumstances. In the first two cases from Australia, the courts there were dealing with applications for the reinstatement of the company that had had its name struck off the companies' register. The procedure is similar to that found in s 308(5) of our Companies Act 1965. The court heard arguments on whether the applicants could be considered as 'aggrieved persons' and concluded by allowing the applications. In the case of *Chiew Sze Sun*, the court was dealing with a petition under s 181 of the Companies Act 1965.

[68] In my judgment, it is entirely a question of the litigant's choice what or which procedure or action will best suit their needs. In both *Re Formcrete* and *Re Waldcourt*, the court granted the applications to reinstate the companies that had been struck out so that the aggrieved parties could pursue actions against the companies. Although the plaintiff had explored but did not ultimately pursue an application under s 308(5), the present recourse is not necessarily wrong. Whether the plaintiff can succeed is a different matter altogether.

[69] Second, the court proceedings. This refers to the proceedings taken by house purchasers where despite a consent judgment entered by the defendants

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on behalf of Springs Court, there was no payment. JDS proceedings were initiated. The defendants did not inform the court of their application to remove Springs Court from the register of companies. According to the defendants, it was because they were not given the opportunity to do so.

[70] From the records of the JDS proceedings, the defendants are seen answering questions concerning the set-up, operation, accounts and finance of Springs Court without any difficulty. At p 175 bundle B, the first defendant is in fact informing the court that 'if you give me time I will come up with the total amount'. This is despite the fact that it was Springs Court 'in the dock' so to speak for not settling the judgment debt. By this time, 11 March 2010, the defendants had already filed their application to strike Springs Court from the register (the application was filed on 31 December 2009). Yet, they did not tell the court about this.

[71] An opportunity to explain again came up when the court was invited to go through the accounts and the statement of affairs of Springs Court. These were for the years 2000–2005. The first defendant informed the court that they were all prepared on 8 January 2009. It was open to him to inform the court the reasons for doing so. Again, he chose to remain silent and made no mention of Springs Court's problems with SSM; and more importantly, his application to SSM for Springs Court's deregistration.

[72] Therefore, the evidence does not support the defendants' explanation that they had no opportunity to tell anyone of their application to SSM. On the contrary, the evidence shows that they had plenty of opportunities to do so. It is reasonable to conclude that the defendants did not tell the court was both a deliberate and conscious decision.

[73] As for the accounts, they too, are telling. Springs Court was supposedly not making money each year. Yet, the accounts show that the directors (the defendants) were paid; their remunerations increasing together with allowances despite the company supposedly not making money.

[74] After hearing evidence and submissions, the court in the JDS proceedings was satisfied that the defendant there, that is, Springs Court had the capacity to satisfy the judgment obtained. The court accordingly ordered Springs Court to pay the judgment sum by 30 April 2010 — see p 191 of bundle B1.

[75] Again, this order of the court was not complied with. The purchasers then commenced committal proceedings. This was on 12 January 2011. The defendants paid. At this time, Springs Court had already been deregistered. Yet again, the defendants did not said anything about the deregistration. Learned

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counsel for the defendants submitted that the defendants paid because they were faced with the serious possibility of being committed for contempt; hence they personally satisfied all sums due under the JDS proceedings.

[76] It is all this silence and failure to inform the court about the status of Springs Court that the plaintiff finds complaint with and which forms part of the basis for the plaintiff's claim; that at no time did the defendants made any distinction between themselves and Springs Court.

[77] Third, the negotiations and meetings. The plaintiff called two witnesses, Ang Loo Leong ('PW1'), a director of the plaintiff; and Yong How Choong ('PW2') a contractor working for the plaintiff. The defendants called four witnesses: Peter Ashley Jayasuria ('DW1'), the defendants' lawyer; Hanita bt Hussain ('DW2') officer with SSM; Thomas Lee Khoon Seng ('DW3') who assisted the defendants by looking after the financial requirements of the project; and the first defendant himself ('DW4').

[78] Save for DW2, all the witnesses were able to testify on the various meetings between the parties. All witnesses agree that the meetings were called specifically to discuss the amount due and payable to the plaintiff by Springs Court and the mechanism for any settlement reached. I note that both parties sent the appropriate persons to discuss these matters at the meetings on 24 and 25 September 2007. For the plaintiff, both PW1 and PW2 attended. For the defendants, DW3 and DW4 attended. One of the September 2007 meetings was in fact held at DW1's office.

[79] At these meetings, there was agreement to settle monies due to the plaintiff by a contra set-off in the form two bungalows. Such settlement involved the third parties besides the contracting parties. The settlement agreement which was drawn up was signed between the parties and another company known as Ideal Dream Sdn Bhd. The defendants' son signed on behalf of Ideal Dream. This is significant as it showed the measure of control the defendants had over Springs Court and the other companies which they were directors and shareholders.

[80] When the parties continued to meet in 2010 to discuss outstanding sums, the defendants never once mentioned the matter of deregistration of Springs Court. Decisions continued to be made. It was very much business as usual.

[81] The plaintiff's contention here was about how involved the defendants were in these matters; and how they carried on in Springs Court's name despite its deregistration. By this time, there would have been no reasonable or probable ground of expectation that Springs Court would be able to pay any

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monies to the plaintiff. Yet, the defendants carried on; negotiated, agreed and promised on behalf of Springs Court as if it had not been deregistered.

[82] From the above evidence, I agree with the plaintiff that there are present special circumstances here to displace this doctrine of separate legal responsibility. I agree with the plaintiff that the manner in which the defendants attended and treated all the matters identified is highly indicative of how the doctrine should operate here.

[83] I agree that the defendants' actions including attending court after Springs Court had been deregistered, without indicating in any manner whatsoever about the deregistration exercise that they had set in motion, were actions inconsistent with that of the defendants as mere directors or shareholders of Springs Court. On the contrary, their actions were consistent and akin with the conclusion that there was in fact no separation between them and Springs Court whether as directors or shareholders.

[84] I further agree with the plaintiff that the defendants displayed conduct indicating that they were not in the least concerned with the status of Springs Court. The letter heads of Springs Court continued to be used for correspondence. In fact, DW1, Springs Court's counsel was not even aware of his clients' actions with respect deregistration. The manner in which the defendants handled the affairs of Springs Court illustrate their relationship with Springs Court; it was theirs to do as they pleased; under the cloak of separate corporate accountability.

[85] The evidence further point to the defendants acting for Springs Court regardless of whether it was registered or not. There was no involvement on the part of the other directors or shareholders; indicating that these were board of directors' decisions. The defendants were unconcerned, unperturbed with Springs Court no longer being an ongoing business, or that it had been struck off the register of companies by SSM. It was business as usual.

[86] When the three matters declared in the SD are viewed together in their chronological context together with the negotiations, meetings, letters written and exchanged between the parties, and what transpired in the JDS proceedings, I am also satisfied that there are special circumstances presented for the court to find these defendants liable for the debt due to the plaintiff. Indeed, these defendants are the directing mind behind Springs Court and they cannot use the veil to hide their true role and responsibilities.

[87] The further conduct of the defendants in applying to reinstate Springs Court themselves, after they had been sued in this action, also corroborates the plaintiff's contentions. The defendants had themselves filed an application

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under s 308(5) of the Companies Act 1965 for Springs Court to be reinstated into the register. Although this application has since been withdrawn, the contents of the first defendant's affidavit filed in support of the application are relevant and insightful.

[88] The first defendant averred that the application was made because creditors of Springs Court were prejudiced by the striking out of Springs Court from the register as they could not recover their debts and have instead chosen to sue the defendants — see p 45 of bundle B3. At paras 9–10 of his affidavit filed in support of the application, the first defendant averred that on the date of the application, Springs Court had a pending litigation against it before the Sessions Court, Kuala Lumpur. This was quite contradictory to his earlier statement in his SD.

[89] I find the defendants' conduct illustrative and corroborative evidence of the plaintiff's contention that the defendants and Springs Court are one and the same. There is no distinction, artificial or otherwise, that the court can draw to the first defendant's acts or even the second defendant's from that of Springs Court. The evidence is both abundant and compelling and I am amply satisfied that the veil of incorporation ought to be lifted to impose liability on the defendants.

[90] The second defendant sought to distance herself in this claim. She claims to be a mere sleeping partner. I do not think so. Although the first defendant was the one who attended to the statutory declaration and attended the meetings and negotiations, the second defendant as the majority shareholder was quite content to let the first defendant, her husband run the show. Nevertheless, she echoed his decisions. As evident from the records she too, attended court and gave evidence during the JDS proceedings. In fact, her husband had informed the court that legally the second defendant was the person who 'calls the shots in Springs Court' but 'it is a family business'. He further said that the second defendant was only a 'sleeping shareholder' and later 'sleeping partner'. He was however the director 'primarily responsible for the accounting records and financial management of Springs Court' — see the financial statements filed.

[91] Given these conditions, the second defendant certainly cannot disclaim liability by folding back her arms and playing a passive role. She, too, must be held accountable. I do not see any distinction between her and the first defendant nor, is there any need to do so. In any case, there are only two directors in Springs Court and that is the two defendants.

[92] I am reminded of the Federal Court's decision in *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533; [1997] 1 CLJ 529. In that case,

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the Federal Court reiterated the court's subscription to the principle of separate corporate legal responsibility but added:

> We are in complete agreement with the basic principle of the fundamental attribute of corporate personality, ie that the corporation is a legal entity distinct from its members, be they individuals or corporate bodies — a principle firmly established since *Saloman v Saloman & Co* [1897] AC 22 (HL). However, since then, the development of the law has seen numerous deviations from the strict rule of the separate legal entity of the company through cases where the courts, on the particular facts and circumstances of those cases, found it appropriate and necessary to depart. Thus in cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies.

[93] There are signs aplenty that prove amply the defendants' creative use of the notional concept of corporate separateness to evade their contractual obligations and duties. This notion of separateness between Springs Court and the defendants ought to be disregarded by reason of the defendants' own disregard at all time. The facts and circumstances have been satisfactorily shown by the plaintiff to be akin to equitable fraud and impropriety on creditors such as the plaintiff. Although the sum due to the plaintiff is disputed, the debt owed to the plaintiff is not denied. Given these circumstances, it is indeed appropriate if not necessary, to depart from the strict rule of separate legal entity.

[94] I therefore am satisfied that the defendants are the right parties to this action and that they have failed to pay as promised to the plaintiff. The upshot of all this is that the defendants are therefore personally, jointly and severally liable for the debt due to the plaintiff under the project.

Issue (d) What is the plaintiff's loss

[95] The plaintiff's total claim is RM1,587,172.96. It comprises the sum of RM919,860.76 after the setting-off via two bungalows and a few other sums that had not been paid under the original contract, namely RM357,000; RM28,020 being variation works, and RM282,292.20 being a claim for the access road.

[96] The defendants contended that the sum was incorrect and that the plaintiff had admitted to a lesser sum of RM861,189.81. In fact, they claim that only RM504,189.91 is actually due and owing to the plaintiff because after checking their figures, they claimed to have overpaid the plaintiff. The defendants relied on what they say is a 'final statement' supposedly prepared by the plaintiff (p 193 of bundle B1).

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[97] The defendants claimed that the parties further negotiated and finally it was agreed that the sum should be reduced to RM350,000 as full and final settlement of whatever was outstanding to the plaintiff. This sum was to be paid within six months from March to September 2011. The defendants informed the court that they were prepared to record this sum as the amount due and outstanding to the plaintiff.

[98] In relation to the amount outstanding, since the plaintiff is premising its claim on the settlement agreement, the proper place to start must be from there. It is evident that the sum should be whatever is still due after the two bungalows have been accounted for.

[99] Bearing in mind that the settlement agreement was made on 9 June 2008, after the project that was abandoned earlier had been resumed, and there were sums still outstanding, it would be reasonable and safe to conclude that the sum stipulated in settlement agreement must have been the total sum still due. If there were these other sums that the plaintiff now claims, it would be reasonable to say that these sums would have been expressly included or excluded as the case may be; just like the retention sum. In which case, the plaintiff cannot now claim for the other sums which are simply not there. For those other sums, they must all be taken to have been considered when drawing up this settlement agreement.

[100] The terms of the settlement agreement found at pp 154–157 of bundle B1 record, inter alia, that the contract sum is RM8,969,554 (see Recital 3). At Recital 5, it is clearly stated that the balance of the contract sum is RM2,119,860.76. The agreement provided for the settlement of a part of the sum due by way of contra through two properties to the value of RM1.2m. It also states that the agreement concerns the settlement of 'the balance contract sum'. Mathematically, that would leave a sum of RM919,860.76 as the balance still unpaid.

[101] PW2 had sought to explain that the figures at p 193 were only a proposal for a 'quick settlement' and that the proposal was never accepted or acted upon by the defendant. I accept PW2's explanation that the figures or proposal were only meant for discussion. The remarks contemporaneously entered in this document support this conclusion. Regardless of that, there is the plaintiff's own letter dated 9 March 2010 — see p 91 of bundle A. In this letter, the plaintiff demanded for the sum of RM861,189.81 as the sum still due and owing.

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[102] The next question is whether this amount has been further reduced to and agreed at RM350,000 in the subsequent meetings between the parties. For this, the witnesses have given differing testimonies as to what actually transpired at these meetings.

[103] In my judgment, the testimony of DW1 is in fact most enlightening. He was the counsel who represented Springs Court at the material time. Two of the negotiations took place at his office; the first meeting in September 2009 while the second meeting was in March 2011. According to DW1, the parties were represented by the following: PW1, PW2 and DW1 and DW3. At the first meeting, the parties could not agree on the figure.

[104] At the next meeting, the plaintiff is said to have finally agreed to settle the sum at RM350,000. This sum was to be paid within six months from the date of the meeting, that is, by September 2011. However, before the time was up, the plaintiff sued. DW1's evidence is supported by DW3 in this respect.

[105] But, that is not all as that meeting was followed up by a telephone conversation between PW2 (Yong) and Thomas Lee (DW3) concerning the payment of RM350,000. The plaintiff's witness, Yong How Choong (PW2) testified that the meeting at DW1's office was on 7 March 2011 at 4.30pm. At that meeting, DW3 had proposed the sum but needed to talk to the first defendant. According to PW2, DW3 told him that he will 'let us know in 2 days time ... Two days later, Thomas Lee called me and proposed that the RM350,000.00 be paid by way of RM 170,000.00 cash and a semi-detached house of RM 180,000.00 in value in Kluang, Johor'.

[106] PW2 further testified that this latest offer of part-settling in the form of property was rejected because the house was located 'in an uncompleted project and has no value'. Therefore, the proposal was not accepted and 'That was the final discussion'.

[107] In my judgment, the total evidence before the court more than convinces me that the parties had not reached any accord on the final figure that would be paid to the plaintiff at that second meeting in March 2011. DW3 still had to go back to the first defendant particularly on how the amount would actually be settled. He then telephoned PW2 and offered to pay the sum in the manner testified by PW2. In fact, the existence of the telephone call to PW2 and its contents in this respect are not denied by DW3 - see Q&A 111 at p 108 of the notes of proceedings.

[108] That being the case, it cannot be safely accepted that there was an agreement on the terms as alleged by the defendants. The issue of estoppel therefore does not arise.

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[109] Be that as it may, it actually does not matter what the agreement may have been if there was any in the first place. This is because the dateline for payment of that sum had lapsed without any payment or any attempt to pay being made. It is upon that non-payment that the plaintiff filed the present suit on 15 September 2011.

[110] For all the reasons stated above, the court is satisfied that the plaintiff has proved its claim on a balance of probabilities. The plaintiff's claim is accordingly allowed; the defendants are personally, jointly and severally liable to the plaintiff for the sum of RM861,189.81 together with interest at the rate of 5%pa from the date of judgment to the date of realisation together with agreed costs of RM70,000.

Claim allowed.

Reported by Kanesh Sundrum